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No. 97-170

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROSS BROTHERS CONSTRUCTION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that it should rule on the merits of the unfair labor practice charge brought in this case, rather than defer the matter to the grievance and arbitration procedure established by the collective bargaining agreement.

2. Whether petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to honor the collective bargaining agreement that the union had negotiated with a new employer association.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unpublished, but the judgment is noted at 113 F.3d 1235 (Table). The decision and order of the National Labor Relations Board (Pet. App. 12a-14a) and the decision of the administrative law judge (Pet. App. 15a-76a) are reported at 315 N.L.R.B. 538.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1997. A petition for rehearing was denied on July 14, 1997. Pet. App. 77a-78a. The petition for a

writ of certiorari was filed on July 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. At the relevant times, petitioner, an employer engaged in general industrial contracting, was a party to a national collective bargaining agreement with the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry (United Association). That national agreement, known as the National Industrial Maintenance Agreement for the United States of America (NIMA), made provision for wages, benefits, and other terms and conditions of employment to be negotiated at the local level by local unions and local employers' associations. Pet. App. 19a, 21a.

Under Article VIII of the NIMA, wage rates paid by an employer who was a party to the NIMA "shall be those as set forth in the current labor agreement of the affiliated Local Union where such work is to be performed and shall be paid to all employees under the terms of this Agreement unless otherwise modified by the National Maintenance Agreements Policy Committee, Inc. [NMAPC]." Pet. App. 21a. Similarly, under Article IX, various benefits were to be paid in accordance with the labor agreement negotiated by the local union. *Id.* at 22a. Thus, under the NIMA, an employer seeking the advantages of the coverage of the NIMA contract was required to pay the existing, negotiated wage structure in the local area based on a labor agreement that the local union negotiated with a local employers' association, whether or not that employer was itself a signatory to the local labor agreement. *Id.* at 28a-29a. Wage

rates could, however, be modified by the NMAPC, a committee consisting of equal numbers of representatives of employer and union members of the United Association, which was established to resolve grievances flowing from contract disputes. *Id.* at 21a, 23a-24a.

Under Article VI of the NIMA, grievances "other than those pertaining to jurisdiction or general wage rates on any work covered by [the agreement]" could also be submitted to the NMAPC, if not resolved in a more informal setting. Pet. App. 22a-23a. The failure of the NMAPC to resolve such grievances constituted a basis for submitting the question to the American Arbitration Association for a binding decision. *Id.* at 23a.

2. For several years, Plumbers Local 577, a local of the United Association, bargained through the Tri-State Building Trades Council (Trades Council) with the Tri-State Building Contractors Association (Tri-State) to establish the wages and benefits referred to in NIMA Articles VIII and IX. Pet. App. 27a. Negotiations between Tri-State and the Trades Council were conducted in two rounds. In the first round, representatives for the two sides bargained for a single percentage or dollar amount increase in wages and benefits to be uniformly applied, regardless of craft. In the second round, individual unions bargained with the appropriate specialty contractors on all other terms and conditions affecting their particular relationship. *Ibid.* As a member of the Trades Council, Local 577 had accepted the wages and benefits negotiated in the Tri-State multicraft agreement, and then incorporated those provisions into its own local contract, which it negotiated with a separate association, the Southern Ohio Mechanical Contrac-

tors Association. *Id.* at 27a-28a. Petitioner was bound by that contract. *Id.* at 28a.

In March 1991, the Trades Council and Tri-State agreed to commence negotiations for a successor wage and benefit agreement to begin after the then-current agreement expired on May 31, 1992. Pet. App. 29a. In May 1991, the members of Local 577 voted down the increase which Tri-State had offered, and its business manager gave notice to the Trades Council and Tri-State that Local 577 was withdrawing bargaining authorization from the Trades Council.[1] *Id.* at 30a-31a. Local 577 indicated, however, that it would continue to abide by the terms of the current agreement until its expiration on May 31, 1992. *Ibid.*

On March 6, 1992, Local 577 invited a newly formed multi-employer bargaining group, the Mechanical Contractors Association of Southeastern Ohio (Southeastern), to negotiate a collective bargaining agreement that would establish the general wage rates applicable under the NIMA. After bargaining sessions taking place over two days, Local 577 and Southeastern entered into a five-year agreement, effective June 1, 1992. Pet. App. 31a. That agreement established two different wage rates, for commercial contract work and for industrial work, and raised the hourly wage for industrial work by $3.09 per hour in the first year, followed by $1 per hour increases in the second and third years. *Id.* at 32a.

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[1] The ground rules for the negotiations permitted any member of either the Trades Council or Tri-State unilaterally to withdraw from the negotiations and to give notice that it would no longer be a party to any ultimate agreement. Pet. App. 29a-30a, 47a.

Petitioner refused to pay its employees the new industrial wage rate. Instead, on June 8, 1992, petitioner filed a grievance with the NMAPC, protesting the new wage rate. Petitioner requested in particular that the NIMA bring the wage rate covering Local 577 in line with wages for other building trades crafts in the area. Pet. App. 33a-36a, 51a-52a.[2] Local 577, in turn, asked the United Association for assistance in the grievance filed by petitioner, by bringing petitioner's refusal to pay the new contract rate before the NMAPC. *Id.* at 38a-39a, 52a. As of the date of the National Labor Relations Board's hearing in this case, in May 1993, the NMAPC had not formally acted upon either petitioner's grievance or Local 577's complaint to the United Association. *Id.* at 39a, 55a-56a.

On August 11, 1992, Local 577 filed an action against petitioner in district court, under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, based on petitioner's failure to pay wages and benefits under the new agreement. That action is still pending. Pet. App. 4a.

3. On November 30, 1992, the United Association filed an unfair labor practice charge with the National Labor Relations Board (Board), which forms the basis for the present proceeding. Pet. App. 4a. After a hearing, an administrative law judge (ALJ) concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C.

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[2] Petitioner asserted that the wage package of the Local 577-Southeastern agreement represented an increase of $3.09, whereas all other local unions had agreed to the Trades Council/Tri-State negotiated increase of $1.50 plus a 12-cent per hour drug testing fee. Pet. App. 34a.

158(a)(5) and (1), by unilaterally refusing to pay wages and benefits that it was obligated to pay under the terms of the Local 577-Southeastern agreement. The ALJ explained that, because petitioner conceded that it was bound by the NIMA obligation to pay the wage rates established in the collective-bargaining agreement negotiated by the local union, "there was a prima facie case of repudiation" of that contract obligation when petitioner failed "to pay the wage rates under the new contract." Pet. App. 43a. The ALJ reasoned that petitioner's "clear repudiation of the contract wage provision is not just a mere breach of the contract, but amounts * * * to the striking of a death blow to the contract as a whole, and is thus, in reality a basic repudiation of the bargaining relationship." *Id.* at 42a (quoting *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. 1063, 1064 (1973), enforced, 505 F.2d 1302 (5th Cir. 1974), cert. denied, 423 U.S. 826 (1975)).

The ALJ rejected petitioner's defense that the contract between Local 577 and Southeastern was invalid because it was not the result of arm's length bargaining. Pet. App. 43a-51a. The ALJ noted that there was "no evidence adduced" that any of the members of Southeastern were not engaged in industrial plumbing contracting, which is the subject of the wage rate to which petitioner objects. *Id.* at 45a. The ALJ also found no evidence of discriminatory motive, discriminatory application of the new contract, or conflict of interest. *Ibid.* He also noted that 30 other contractors had signed the new agreement. *Id.* at 45a-46a.

The ALJ also rejected petitioner's argument that the Board should defer to the NIMA's grievance procedure for resolution of the parties' dispute, rather than exercise its jurisdiction to rule on the United Association's unfair labor practice charge. Noting

that Article VI of the NIMA excludes from the contract grievance procedure grievances "pertaining to * * * general wage rates," the ALJ first concluded that deferral should be denied because the question whether petitioner was required to pay the new wage rates negotiated by Local 577, "having been clearly excluded, is not even arguably covered by the contract grievance procedure." Pet. App. 54a-55a.

The ALJ found further that, even if the wage rates were grievable, petitioner had "failed to comply with step 5 of the grievance procedure," which provides that the failure of the NMAPC to reach a decision "shall constitute a basis for a submittal of the question to the American Arbitration Association for a binding decision." Pet. App. 55a. As the NMAPC had taken no action on petitioner's grievance in 11 months, the ALJ concluded that "there has been a *failure* of NMAPC to reach a decision." *Id.* at 56a. The ALJ subsequently reiterated his conclusion that petitioner "has rested on its oars for 11 months following submission of its protest against the Local 577 new wage structure," and suggested that petitioner "is apparently content with NMAPC's inaction," given that petitioner was obligated to pay the wages negotiated by Local 577 unless and until they were modified by the NMAPC. *Id.* at 59a. The ALJ summarized by stating that deferral should not be ordered "because the party seeking Board deferral [petitioner] is not acting with diligence in securing the exceptional rights it seeks pursuant to the contract on which it depends." *Id.* at 60a.

4. The Board affirmed the ALJ's findings and conclusions, and adopted his recommended order. Pet. App. 12a-14a. That order, *inter alia*, requires petitioner to cease and desist from the unfair labor

practices found, and to reimburse its United Association employees and Local 577 for any losses they may have suffered as a result of petitioner's failure to pay the wages and benefits specified in the Local 577-Southeastern contract. *Id.* at 71a-73a.

5. The court of appeals, in an unpublished *per curiam* opinion, enforced the Board's order. Pet. App. 1a-11a. The court concluded that, since the NIMA did not provide for arbitration of wage disputes and petitioner did not pursue its claim to arbitration, the Board did not abuse its discretion in declining to defer the dispute to the contract grievance and arbitration procedure. *Id.* at 7a-8a. The court also ruled that the Board did not err in rejecting petitioner's claim that Local 577 and Southeastern had not engaged in arm's length bargaining. *Id.* at 8a.

ARGUMENT

1. Petitioner argues (Pet. 11-26) that the National Labor Relations Board erred in exercising its unfair labor practice jurisdiction over this dispute, and should have deferred to the outcome of the grievance procedure invoked by petitioner in protesting the new wage rates set by the agreement between Local 577 and Southeastern. The ALJ, the Board, and the court of appeals correctly concluded, however, that deferral was not appropriate or required on the facts of this case, in light of inaction on the grievance and petitioner's failure to pursue the matter to arbitration.[3]

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[3] Petitioner argues (Pet. 11) that it "sought to invoke the grievance processes for final and binding arbitration under Article VI to determine if [Southeastern] were a valid body with which a valid local agreement could be negotiated with Local 577 and if the contract they negotiated would be recognized as a valid local agreement under NIMA," and that

In *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), the Board, in the exercise of its discretion and in order to effectuate the statutory policy favoring voluntary settlement of labor disputes through arbitral processes (see 29 U.S.C. 173(d)), held that it would decline to decide disputes involving the interpretation of contract terms which were capable of resolution under the contract grievance and arbitration procedure, but instead would require the parties to submit such disputes to the contract procedure. In *United*

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the ALJ erred in treating this case as purely a dispute over wages. It makes no difference in this case, however, whether the ALJ may have erred to the extent that he appears to have concluded that petitioner was protesting only the wage rates set out in the Southeastern agreement. The ALJ reasonably read petitioner's June 8, 1992 letter to the NMAPC as complaining in principal part about the high rates set for industrial work in the Southeastern agreement. See Pet. App. 54a-55a. Although the letter (*id.* at 34a-36a) referred to Local 577's having abandoned both the Trades Council and its collective bargaining partner, Tri-States, the bulk of the letter protested the amount of the wage increase provided in the agreement. Also, the letter did not request the NMAPC to invalidate the agreement, but only to modify the amount of the wage increase. Nor did the ALJ overlook that, even if the Southeastern agreement were a valid local agreement, "there [was] still a question of whether the NIMA Policy Committee [would] reduce the [wage] rate [petitioner] must pay pursuant to Article VIII." Pet. 12. The ALJ recognized that, since Article VIII permitted the NMAPC to modify the wage rates in a local agreement, "the Board might well entertain deferral based upon the language of article VIII * * * and the essential thrust of [petitioner's] June 8 protest to NMAPC concerning the high wage rates." Pet. App. 59a. Nevertheless, the ALJ concluded that Board deferral to the contract procedure would not be appropriate in this case because "[t]here has been 11 months of NIMA inaction and 11 months of [petitioner's] failing to pursue the matter." *Ibid.*

Technologies Corp., 268 N.L.R.B. 557, 559 (1984), the Board reaffirmed and extended that policy, and stated that it would be "contrary to the basic principles of the [National Labor Relations] Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through [the arbitral] machinery." The Board cautioned, however, that its policy of deferral was designed to prevent the parties from "ignor[ing] their agreement and * * * petition[ing] [the] Board *in the first instance* for remedial relief," *ibid.* (emphasis added), and it noted that "deferral is not akin to abdication"; "[i]t is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed." *Id.* at 560.

On the facts of this case, the ALJ concluded that the parties' grievance mechanism had failed its "chance to succeed," and that petitioner had abandoned its opportunity under the NIMA to pursue to arbitration its effort to seek modification of the new wage rates. The ALJ noted that, despite "11 months of NIMA inaction" on petitioner's protest, petitioner had "rested on its oars" by failing to pursue the matter further. Pet. App. 59a. Given that petitioner was obligated under the NIMA to pay the wage rates established by the local agreement unless and until those rates were altered by the NMAPC, the ALJ found it reasonable to conclude that petitioner was "apparently content with NMAPC's inaction in the disposition of its June 8, 1992 protest." *Ibid.*

Thus, this case is not like *United Technologies*, where the Board declined to "jump into the fray" before the parties gave their arbitral machinery a chance to succeed. Nor is the Board's decision not to

defer to arbitration in this case contrary to its decision in either *Spann Building Maintenance Co.*, 275 N.L.R.B. 971 (1985), petition for review denied *sub nom.*, *Lewis* v. *NLRB*, 800 F.2d 818 (8th Cir. 1986), supplemental Board decision, 284 N.L.R.B. 470 (1987), supplemented, 289 N.L.R.B. 915 (1988), or *United Beef Co.*, 272 N.L.R.B. 66 (1984). Although the Board found on the facts of those cases that, despite delays in proceeding to arbitration, deferral to the grievance-arbitration procedure was still appropriate, it reaffirmed in both cases the principle that it would exercise jurisdiction over a dispute which has not "with reasonable promptness * * * either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration." See *Spann*, 284 N.L.R.B. at 470; *United Beef*, 272 N.L.R.B. at 68-69. Thus, the difference between the decision in this case and the decisions in *Spann* and *United Beef* turns on the Board's evaluation of the particular facts, rather than on a difference in legal principle.

This case is factually different from both *Spann* and *United Beef* in significant respects. In both *United Beef* and *Spann*, the charging party before the Board originally initiated the private-resolution mechanism through his union. In *United Beef*, the Board expressed concern that the union was seeking to avoid the unfavorable consequences of the arbitral and grievance machinery that it had invoked, see 272 N.L.R.B. at 68; in *Spann*, the Board concluded that, once the union invoked the grievance-arbitration mechanism, that process should be allowed to run its course, see 275 N.L.R.B. at 972. In this case, by contrast, petitioner first invoked the NMAPC's grievance mechanism, and the ALJ expressed concern that

petitioner was attempting to delay a resolution by the Board of the charge filed by the United Association by "not acting with diligence" on its grievance. See Pet. App. 60a. Nothing in *Collyer* suggests that the Board is required to defer to the contract grievance and arbitration procedure in a dispute in which the charged party has not been diligent in pursuing its arbitration remedy. Indeed, the *Collyer* deferral policy expressly provides that the Board will determine the dispute where it "has not, with reasonable promptness * * * either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration." *Collyer*, 192 N.L.R.B. at 843.

2. Petitioner further contends (Pet. 27-29) that the Board erred in requiring it to be bound by the contract that Local 577 negotiated with Southeastern because the principal negotiators on behalf of Southeastern owed "duties of loyalty to the Union [that] conflicted with their duties on behalf of [petitioner] and the other Industrial contractors." The ALJ and the Board found that there was no conflict of loyalty, and that the parties had engaged in arm's length bargaining (Pet. App. 13a, 45a-46a); that finding was upheld by the court of appeals (*id.* at 8a-9a). That factual issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the record fully supports the Board's finding that the contract was negotiated in good faith and at arm's length. The fact that several principals of Southeastern were also members of Local 577 is not of overriding significance, for it is not uncommon in the construction industry for contractors to retain their union membership. See *Nassau & Suffolk Con-*

tractors' Ass'n, 118 N.L.R.B. 174, 184 (1957) (recognizing that this practice is not unlawful, so long as the union does not attempt to exert unlawful influence upon the employer/union member and the employer/union member is not involved in union affairs to any significant degree). As the ALJ noted, the only record evidence regarding the ability of contractor/union members to work as journeymen plumbers (and thus enjoy the enhanced wages and benefits provided by the Southeastern agreement) was that, if they abandoned or severely limited their contracting function, they could be referred to jobs from the bottom of the Local 577 eligibility list. Pet. App. 31a n.7, 45a. Nor is there anything suspect in the fact that Local 577 and Southeastern came to an agreement a short period of time, or that the agreement established a separate rate for industrial contractors (including petitioner) that was higher than that for commercial work. The ALJ specifically found, based on the record before him, that "[t]he speed of execution and prior negotiations leading to the new contract does not constitute evidence of bad faith, discrimination, or overreaching." *Id.* at 46a. The ALJ also noted that there was no evidence adduced that any of the six contracting organizations that formed Southeastern were not engaged in industrial, as well as commercial, plumbing work, and that more than 30 other contractors working in the area signed the Southeastern agreement. *Id.* at 45a-46a.

Petitioner relies (Pet. 27-29) on court and Board cases holding that an employer may lawfully withdraw from a multi-employer bargaining unit when the evidence establishes that the employer's interests are not fairly represented by the association, or where the union is attempting to "whipsaw" employers into

an agreement by fragmenting the employer association. See *NLRB* v. *Siebler Heating & Air Conditioning, Inc.*, 563 F.2d 366, 370-371 (8th Cir. 1977); *Universal Enterprises, Inc.*, 291 N.L.R.B. 670, 671, 676-677 (1988). On the facts of this case, however, the ALJ found that the new contract was negotiated in good faith and at arm's length. Pet. App. 44a. That finding, which was sustained by the Board and the court of appeals, presents no legal issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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